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No. 86-265

In the Supreme Court of the United States

October Term, 1986

G & M RICHMOND,
Appellant,

vs.

CITY OF RICHMOND HEIGHTS,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether potential economic deprivation by means of pre-existing zoning restrictions applicable to recently acquired property and increased usage of a county airport located across a highway which separates zoning districts is sufficient evidence to declare improper and unconstitutional a comprehensive zoning ordinance which has been adopted and reviewed periodically by professional city planners.

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G & M RICHMOND,
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vs.

CITY OF RICHMOND HEIGHTS,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

Appellee respectfully moves this Court to dismiss the within appeal on the basis that there is no substantial federal question presented or, in the alternative, to affirm the action of the Ohio Supreme Court in refusing to review the judgment of the Eighth Judicial District Court of Appeals of Ohio as a proper statement of the law with respect to the questions presented, on the basis of the brief submitted with respect to each motion.

STATEMENT OF FACTS

A. Facts About Property

The subject property consists of a 122-acre estate of wooded land located in the City of Richmond Heights, Ohio, which was the residence of the Mavec family from 1955 (Jt. Ex. 20, page 5) until sold to appellant in 1982

(T. 211). The property is zoned for single-family residential development, a fact of which the appellant was aware when it purchased the land (T. 211) in 1982 through a scheme of financing indicating a fair market value of $450,000 (Ex. E) for the stated primary purpose to make money from the land by having it rezoned for office-industrial use (T. 204).

The subject property is not vacant and raw land but rather there exists on the property either four or five homes, one of which has fire damage. The others are rented (T. 467). There is a pond, tennis courts, a stable, garage complex and related residential improvements and landscaping located on the property (T. 467).

The land was zoned single-family residential in 1929 and is a portion of land formerly known as the Swetland Estate comprising 157 acres. The property was acquired by the Mavec family in 1955 who used 35 acres of this land for the development of Lancaster Estates Subdivision, the present site of 117 homes (T. 467). Lancaster Estates Subdivision contains a stub street so that subsequent residential development on appellant's property could be constructed adjoining the existing subdivision (T. 597, 411). The Lancaster Estates Subdivision appears on Exhibit A, located in the Appendix of this Motion, and is marked with an "A". The Exhibit depicts existing subdivisions surrounding the subject property upon which homes have been constructed.

Adjacent to the subject property to the south is the Fairlawn Subdivision developed in 1955 upon which are located 33 homes. Fairlawn Subdivision also contains stub streets designed to continue residential building onto the adjoining subject property in good planning fashion (T. 597). This subdivision appears on Exhibit A and is marked with a "B".

Both the Lancaster Estates and Fairlawn Subdivisions are on the same level of terrain and neither are separated from the subject property by ravines.

Even though the land is in an area of Richmond Heights containing natural ravines, upon one ravine which follows the rear, southwest, property line are 193 homes which were built during the 1960s as a part of the Scottish Highlands Subdivision which is marked on Exhibit A with a "C" and forms a large portion of residential homes within the City of Richmond Heights. The deepest ravine on plaintiff's property is the same ravine upon which homes in the Scottish Highlands' Royal Oak Boulevard area front, some of which were sold in 1983 for between $110,000 and $115,000 (T. 49, 160).

Due to one ravine running roughly through the center of the property, a culvert and a road must be built to connect the front flat usable area and rear flat usable area of the land if developed for *any* purpose (T. 144). Sewage treatment will also be required *regardless* of the type of development proposed (T. 144). Due solely to the natural topography of the land, the subject property contains only 88 buildable acres *regardless* of use (T. 159).

The only portion of the subject property not abutted by single-family residential development is the frontage of 1,148 feet which abuts Richmond Road and contains the bulk of the buildable land. Richmond Road has been since 1929 and continues to be *a two-lane highway* (T. 157).

Richmond Road forms the natural divider between the frontage of the subject property and the Cuyahoga County Airport (T. 599) and serves as a divider of zoning districts (T. 599). To screen the Cuyahoga County Airport from the view of the homes already located in the vicinity of the subject property, the County installed a landscaping

buffer along Richmond Road consisting of some beautiful scenery and mounds with trees and shrubbery (T. 304, 341). The buffering zone is approximately 200 feet in depth off of Richmond Road for almost the entire length of the Cuyahoga County Airport property and includes mounding, conifer trees, deciduous trees, shrubbery and landscaping all along the eastern side of Richmond Road (T. 575).

The Director of Aviation of the Cuyahoga County Airport testified that the flight path of the airport does not extend across the subject property (T. 301).

The Fairlawn Subdivision homes were constructed into the early 1960s when airport flights were 34,000 per year and the Scottish Highlands Subdivision enjoyed quick home sales during the 1970s even though the airport was then at its peak and conducting over 100,000 flights annually (Ex. 15).

The number of annual flights coming and going from the airport have decreased since 1973 (Ex. 15) due, in part, to the deletion of plans to establish a second runway at the Cuyahoga County Airport (T. 593). Furthermore, flight operations for jet aircraft have been restricted to daytime hours in recent years (T. 303).

The subject property received its original single-family residential zoning classification in 1929 when Richmond Heights adopted a comprehensive zoning ordinance. The zoning ordinance of 1929 was subject to review and a comprehensive master plan was prepared by Barton & Gould, city planners in 1964 (Ex. A). The 1964 Master Plan was reviewed, revised and updated in 1972 by the Regional Planning Commission of Cuyahoga County (Ex. RR). A request by the former owner of the property

(Mavec) for industrial and office use was studied by Regional Planning and rejected by Council in 1980 (Ex. QQ).

B. Facts About the Trial

Thirteen witnesses, some of whom were experts, testified at the trial of this matter. Two engineers gave differing views. Appellant employed Roger Ritley, a property-economist, and appraiser Richard Van Curen who performed a feasibility analysis. Appellant property owner, Wayne Gerl, testified that he was aware of the residential zoning of the subject property before purchasing same in 1982 (T. 211) for $450,000 (T. 205). He speculated about dramatic out-of-pocket losses he would incur to develop his property residentially. His figures *differed from his employed experts* and were obtained when he "just checked with real estate experts in the area" (T. 188).

The City's witnesses included expert appraiser Wesley Baker who calculated the fair market value of the subject property as residentially zoned at $600,000, an increase in fair market value of $150,000 in the three years which had passed since appellant had purchased the land (T. 466). He calculated fair market value in accordance with the dicta of *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34 and testified that the owners would not incur any actual out-of-pocket loss in developing this land under the present residential zoning classification.

City planner, Robert Parry, had been involved with zoning updates of the City in previous years and continued to recommend that the zoning for the subject property was properly residential:

> "I concluded that the current zoning was reasonable and that it is an appropriate zoning for the site. And as was found in the two previous plans. [-] both recommended that this land stay residential. I concurred that it should stay residential and that the intrusion of industrial, nonresidential development on this site was really inappropriate for the site." (T. 603)

Upon review of the transcript and evidence, the Eighth District Court of Appeals held, in view of the above and other trial testimony, that the validity of the challenged single-family residential zoning ordinance was fairly debatable and, therefore, the judgment of the trial court was against the weight of the evidence in that the trial court had usurped the legislation function by substituting its judgment for that of the Richmond Heights city council (Court of Appeals Journal Entry and Opinion, Jurisdictional Statement, p. 45).

THIS APPEAL SHOULD BE DISMISSED AS THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

This case began as a trial to the court upon a complaint for declaratory judgment alleging that the single-family residential zoning for appellant's property was arbitrary, discriminatory, unreasonable and unconstitutional as applied to its property. To this zoning ordinance was attached a presumption of validity. *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93; *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23. In attacking the validity of the zoning ordinance, appellant had the burden of proving the ordinance unconstitutional by taking the matter beyond the reach of fair debate. *Benjamin v. Columbus* (1957),

167 Ohio St. 103; *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34; *Alsenas v. Brecksville* (1972), 29 Ohio App. 2d 255.

The "beyond fair debate" test was explained in *Central Motors Corp. v. Pepper Pike, supra,* in the following manner:

> "The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. *The fairly debatable rule must concern itself not with mere words or expressions of opinion, but basic physical facts pertinent to the issue of the validity of the zoning ordinance.* (Emphasis added.)
>
> Where it appears from *all the facts* that room exists for a difference of opinion concerning the reasonableness of a zoning classification, the legislative judgment is conclusive. Within reasonably debatable areas of judgment and policies, courts will not attempt to decide what ought to be done or not done by local zoning authorities. Only where illegality is clearly demonstrated or where the ordinance is arbitrary, unreasonable or discriminatory is judicial interference warranted." (Emphasis in original.)

Despite the clearly established guidelines of the Ohio Supreme Court and numerous appellate court decisions concerning the trial of zoning cases, the trial court in this case took solely an economic approach to this matter and held the residential zoning ordinance unconstitutional. The

appellee, City of Richmond Heights, appealed the trial court's decision as against the weight of the evidence, as having improperly shifted the burden of proof to the City and as having substituted its judgment for the judgment of the Richmond Heights City Council on matters which were clearly debatable.

The Court of Appeals was thereafter charged with the duty of reviewing the evidence, i.e. *all the facts* presented at trial. Its review function was analogous to the function of the reviewing appellate court in the *Central Motors* zoning case wherein the court noted in the third syllabus that:

> "3. * * * The issues to be determined in a declaratory judgment action attacking constitutionality of a zoning ordinance may include an objective determination as to whether the ordinance is unreasonable, arbitrary and confiscatory and not based on the public health, safety, morals and general welfare, and thus whether or not it is unconstitutional. * * *" *Id.*

The question on appeal in this case *was not* whether the appellate court could find some evidence to support the trial court's conclusion but whether the plaintiff had overcome the presumption of validity and placed beyond fair debate the reasonableness of the actions of council in zoning the property for residential use *and* that the ordinance had no substantial relationship to the public health, safety and general welfare for all the citizens of the city as opposed to the individual property owner. This appellate task required a review of the evidence.

For generations it has been a firmly established rule in Ohio appellate review law that the Court of Appeals not only has the power to weigh evidence but, if the case is

a proper one and the question has been properly brought up on the record, it is its duty to do so. *Finley v. Whitley,* 46 Ohio St. 524; *Bahl v. Byal,* 90 Ohio St. 129; *Werner v. Rowley,* 129 Ohio St. 15, 1 Ohio Op. 309, 193 N.E. 623. "Upon questions of this character it is practically the court of last resort. At least it is the last court which the parties have a legal right to require to pass upon the weight of the evidence." 5 O. JUR. 3d, *Appellate Review,* Section 595.

The court of appeals found that qualitative evidence had been introduced at trial by the City supporting the reasonableness and constitutionality of the residential zoning and, therefore, that the appellant had failed to place the validity of the zoning legislation beyond fair debate. The Supreme Court of Ohio has held in the second syllabus of *State, ex rel. Jack v. Russell* (1954), 162 Ohio St. 281, 123 N.E.2d 261, that:

> "2. It is not within the judicial function for courts to pass upon the wisdom of a zoning ordinance; they may only determine whether such an ordinance is reasonably comprehensive in its application and has a reasonable relation to the preservation of the public health, safety and morals; and, where such an ordinance is so qualified, its enforcement does not constitute a taking of private property without compensation or the taking of property without due process of law, within the meaning of constitutional requirements."

The court of appeals herein found that reasonable minds could differ as to the appropriateness of the residential zoning classification as applied to appellant's property. Some of the facts properly found by the court of appeals included the following:

1. Appellee presented no evidence which demonstrated the ordinance was arbitrary, confiscatory and not related to the public health, safety, morals and general welfare.

2. The commercial development occurring in Richmond Heights is taking place in areas of the community removed from these residential areas. In addition, undeveloped land zoned for industrial use exists in other areas of Richmond Heights.

3. The fact appellee could reap substantially larger profits by developing the property for industrial purposes does not justify destroying the picturesque topography of the area. Despite the growth of the nearby Cuyahoga County Airport, the areas immediately surrounding the subject property remain residential neighborhoods. The homeowners in these surrounding areas invested in their homes with the expectation the natural beauty of the area would not be invaded by the establishment of an industrial complex in their backyards.

4. At trial the *only* factor appellee proved was the economic loss it would incur as a result of the existing zoning ordinance. Economic loss alone is not a sufficient reason to declare a zoning provision unconstitutional.

5. The trial was in essence a battle of experts. Appellant's experts testified the present R-1 zoning designation is reasonable and appropriate while appellee's experts countered with testimony the single-family residential classification is not feasible. Thus, the evidence presented at trial established reasonable minds differ on the issue of the reasonableness of the zoning ordinance.

Although the appellant presented a voluminous amount of evidence, the court of appeals was also correct in finding the balancing between the public benefit and the individual loss was of a *qualitative* nature and not of a quantitative nature. See: *Alsenas v. Brecksville* (1972), 29 Ohio App. 2d 255.

From its review of all of the underlying physical facts in this case, the court of appeals properly concluded that the evidence presented by the appellee had not removed the zoning legislation beyond the realm of fair debate, the standard test in Ohio to this date. The lower court decision was, therefore, against the manifest weight of the evidence and the court of appeals properly reversed.

The Ohio Supreme Court refused to take jurisdiction of this matter for the sole purpose of re-reviewing the evidence presented at the trial of this case. Appellant claims the decision of the court of appeals was, in effect, against the manifest weight of the evidence.

Ohio Revised Code Section 2505.31 states:

> "In a civil case or proceeding, except when its jurisdiction is original and except as provided by Section 2309.59 of the Revised Code, the Supreme Court need not determine as to the weight of the evidence."

In accordance with this statutory provision, it is and has been for many decades the established practice of the Supreme Court of Ohio to refuse to weigh the evidence to determine its sufficiency, where the preponderance lies, or whether correct conclusions as to the facts were reached by the courts below. *Pomeroy v. Webber* (1965), 2 Ohio St. 84, 206 N.E.2d 204.

The test applied by the state court of appeals in this case was the "beyond fair debate" standard discussed previ-

ously. Even appellant indicates in its Jurisdictional Statement that the "beyond fair debate" standard was the appropriate test to apply.

No question of law is suggested. The court of appeals found from its review of the factual record that there existed a reasonable and rational basis for the continuing applicability of the challenged residential zoning restriction to the particular property. This case is, therefore, distinguished from the Ohio Supreme Court's decision in *Mayfield-Dorsh, Inc. v. South Euclid* (1981), 68 Ohio St. 2d 156, discussed in appellant's brief.

Faced with an unfavorable court decision, appellant has now requested that this Supreme Court of the United States review the evidence presented at trial for a third time. Appellant has gratuitously highlighted favorable evidence contained in the Journal Entry of the trial court for this Court's review should it decide to fly in the face of "decades of established practice" "to weigh the evidence to determine its sufficiency . . . or whether correct conclusions as to the facts were reached by the court of appeals below." *See*, 5 O. JUR. 3d, *Appellate Review*, Section 593. The City of Richmond Heights urges this Court not to become involved in the weighing of conflicting evidence again.

THE JUDGMENT OF THE OHIO STATE SUPREME COURT SHOULD BE AFFIRMED.

This lawsuit stems from one entity's attempts to maximize profits by developing one recently acquired property without regard to well-planned zoning restrictions. Appellant purchased the subject property in 1982 for essentially $450,000 (Ex. E) knowing the land was zoned for

single-family residential use (T. 211). The property as currently zoned has a fair market value of $600,000 (T. 466). This experienced contractor made the purchase "under the assumption that the property would be rezoned for office-industrial" use (T. 211). The prime motivating factor in appellant's purchase was to make money from the property by having it rezoned. Facing lesser profits if the land is developed residentially, appellant contends that this case contains a substantial federal question. Rather, the ramifications of this case are clearly confined to the extent of future profits to be earned by appellant from the development of its recently acquired realty.

The application of law to the facts by trial courts and the duties of appellate courts to review the record and weigh the evidence applicable to zoning cases have been established in numerous case precedents from this Supreme Court as well as lower appellate courts throughout the country.

Because the private interests of appellant do not rise to the level of public or great general interest that this court should address and the appellant has failed to present a substantial constitutional question, the within case is not appropriate for review by this Court and jurisdiction should be denied and the decision of the lower court should be affirmed.

Respectfully submitted,

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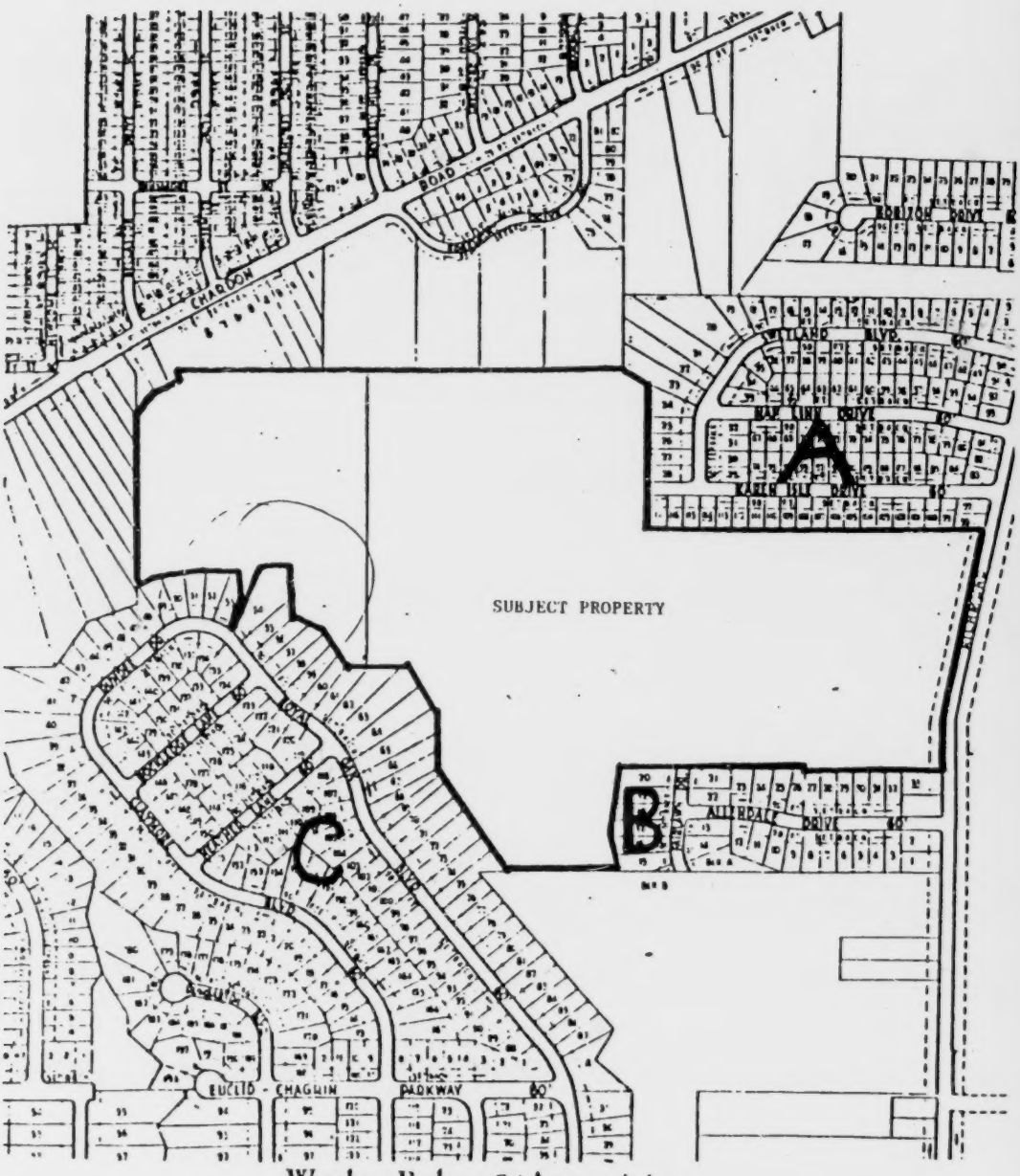
APPENDIX

DEFENDANT'S EXHIBIT H - Page 2

EXHIBIT "A"



Wesley Baker & Associates